May 26, 2005

Chairman James Sensenbrenner, Jr.
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Re.: Oversight Hearing of the Subcommittee on Crime, Terrorism and Homeland Security regarding the Material Witness Statute and USA PATRIOT Act Sections 505 and 804

Chairman Sensenbrenner:

Thank you for providing the Center for Constitutional Rights with the opportunity to discuss abuses in the application of, and needed reforms to, the Material Witness Statute, and the need to ensure that United States criminal jurisdiction extends over all members of our armed forces and their contractors and support personnel.

Material Witness Statute

Congress enacted 18 U.S.C. § 3144, known as the "material witness statute," in 1984 to allow for a *limited exception* to the general rule that an individual may not be detained or otherwise suffer a loss of liberty without a showing of probable cause to believe that he or she has committed a crime. The statute authorizes arrest and detention for a "reasonable period of time" of any person upon a showing that "the testimony of [that] person is material in a criminal proceeding" and "it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144. Before September 11, 2001, the statute was used according to the plain meaning of its text—to briefly detain witnesses to crimes who were likely to flee or otherwise avoid testifying at criminal trials. Since September 11, however, the Bush Administration has reinvented the meaning of the material witness statute, and has misused it to preventively detain criminal or terrorist suspects against whom it cannot show probable cause of criminal activity while it carries out its investigation and builds its criminal case. This expansive exercise of executive power under the material witness statute has led to serious violations of constitutional and international law by: (1) allowing for arbitrary and indefinite detention upon a minimal showing; (2) limiting the ability of the press and the public to monitor the actions of our executive; and (3) facilitating racial and religious profiling and harsh treatment of suspected terrorists.

The Bush Administration's misuse of the material witness statute has primarily been accomplished through detention of alleged material witnesses in connection to grand jury proceedings—proceedings that allow prosecutors almost unbounded investigative power and discretion[1] and frequently operate in complete secrecy.[2] Use of the material witness statute in

[1] *United States v. Dionisio*, 410 U.S. 1, 8 (1973)
[2] *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 298-99 (1991).

connection to grand jury proceedings allows the Justice Department to detain any individual on the "mere statement" by a government official that an individual has information material to a grand jury proceeding.[3] "Materiality" of course, is extremely broad when considered in relation to the unbounded investigative power of the grand jury. Once a grand jury is convened, its investigation may continue indefinitely, with an ever-expanding or shifting focus and the grand jury has the power to subpoena any and all testimony and information unless there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the investigation.[4]

Since 9/11, material witnesses have frequently been treated in a manner suggesting that the Justice Department considers them suspected terrorists, rather than mere witnesses to terrorist or criminal acts. According to an investigation by the ACLU and Human Rights Watch, material witnesses described their arrests as high profile and intense, involving many armed agents with drawn guns, and followed by extremely restrictive and prolonged confinement.[5] Osama Awadallah is one example. The District Court Judge who considered the legality of Mr. Awadallah's detention stated that: "without any claim that there was probable cause to believe he had violated any law—Awadallah bore the full weight of a prison system designed to punish convicted criminals as well as incapacitate individuals arrested or indicted for criminal conduct … [and] the conditions of his confinement were more restrictive than that experienced by the general prison population."[6] Mr. Awadallah was held in solitary confinement, shackled and strip searched whenever he left his cell, and prohibited from having family visits.[7] He also complained of physical abuse while incarcerated, evidenced by bruises on his arms, shoulders, and ankles, and other signs of beating.[8]

That the Administration is currently misusing the material witness statute as a form of preventive detention for suspected terrorists is proven not just by the treatment of these witnesses, but by the outcome of the detentions. According to the ACLU and HRW report, only a little more than half of the material witnesses detained since 9/11 actually testified in a criminal proceeding.[9] The case of Abdullah al Kidd provides one striking example of the human consequences of this unrestrained power. Mr. Kidd is a U.S. citizen who was arrested as a material witness, confined for several weeks, and then ordered to remain within a four-state territory and reside with his wife's parents.[10] Mr. Kidd was never called to testify, but his detention and living restrictions did cost him his job and his marriage.[11] Compounding the injury, the charge he was detained to testify in relation to was an utterly trivial one—overstaying a student visa.

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3 *United States v. Awadallah*, 349 F.3d 42, 70 (2d Cir. 2003)

4 *R. Enterprises, Inc.*, 498 U.S. at 301.

5 *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, by Anjana Malhotra, in 2004 ACLU Civil Liberties Report, Dec. 10, 2004 at 3.

6 *United States v. Awadallah*, 202 F.Supp.2d 55, 60 (S.D.N.Y. 2002)

7 *Id.*

8 *Id.* at 61.

9 *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, by Anjana Malhotra, in 2004 ACLU Civil Liberties Report, Dec. 10, 2004 at 3.

10 Adam Liptak, *For Post-9/11 Material Witnesses, It is Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004.

11 *Id.*

Because material witnesses are not held as criminal suspects, they receive none of the procedural protections the United States Constitution guarantees for suspected criminals. They may be arrested without a showing of probable cause; interrogated without the benefit of Miranda warnings; held without immediate access to an attorney, and denied the benefit of knowing the charges or evidence against them. Moreover, recent case law has embraced an extremely low threshold for meeting the second requirement of the material witness statute: that it would be impracticable to secure the witness's testimony without a subpoena. Mr. Awadallah, for example, was held to be a flight risk largely because he did not step forward on his own, to share information with the Government.[12] This low standard allows for prolonged detention without the necessity of complying with Constitutional protections, and has facilitated the Department of Justice's ability to engage in aggressive interrogation and investigation throughout the detention period. These investigations have often resulted in criminal charges or other forms of control, including detention as alleged enemy combatants. In fact, the only alleged enemy combatants known to have been arrested on United States soil, Jose Padilla and Ali Saleh Kahlah Al-Marri, were both initially arrested as material witnesses.

Moreover, because grand jury proceedings may be kept under seal, and material witnesses need not be charged with a crime, the media and the public often lack access to these individuals' stories. The secrecy of the detentions and the lack of judicial oversight allows for the executive overreaching and abuse described above, as well as disproportionate enforcement against racial and religious minorities. As with the other law enforcement techniques seized upon by this Administration after 9/11, the Justice Department has disproportionately used the material witness statute against Arab, South Asian, and Muslim men. Of 70 documented arrests of material witnesses in terrorism related cases, only one witness was not Muslim, and only two witnesses were not of Middle Eastern or South Asian descent.[13] The unbounded discretion and limited judicial oversight endemic to this Administration's interpretation of the material witness statute serves to facilitate their demonstrated willingness to use religion, race, and national origin as a proxy for dangerousness, suspicion and flight risk.

In conclusion, the Administration has transformed a narrow and carefully crafted exception to the prohibition of detention without probable cause into authorization for unbounded and indefinite detention for the purposes of criminal investigation, without the procedural protections required by the United States Constitution for such detention. It is unsurprising that the resultant secret detentions have been marred by executive overreaching, evidentiary mistakes, and physical abuse. The Center for Constitutional Rights recommends that Congress amend section 3144 to clearly prohibit use of the statute in connection to grand jury proceedings, or as a form of preventive detention. Should Congress wish to authorize the type of preventive detention already occurring under this Administration, it must do so by crafting a carefully limited detention scheme bounded by procedures relevant to the particular purposes of the detention, and mindful of the potentially severe intrusions on personal liberty. Anything less

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12 *United States v. Awadallah*, 349 F.3d 42, 81 (2d Cir. 2003)

13 *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, by Anjana Malhotra, in 2004 ACLU CIVIL LIBERTIES REPORT (Dec. 10, 2004) at 5.

violates the central tenet that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[14]

USA PATRIOT Act Section 804

1. Background

Crimes are usually outlawed, prosecuted and punished by the nations where they are committed. However, many federal statutes have extraterritorial application. Title 18 of the United States Code defines the vast majority of federal crimes. Most sections of the criminal code provide that acts taking place within the "special maritime and territorial jurisdiction of the United States" are crimes which may be prosecuted by United States Attorneys in the federal courts. Section 804 of the USA PATRIOT Act amended the provision of Title 18 that defines the "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7. Before the PATRIOT Act, the "special maritime and territorial jurisdiction" was defined to stretch this domestic criminal jurisdiction to United States territorial waters, U.S. registered vessels, aircraft belonging to the United States or Americans, spacecraft of the United States, and, where an offense is committed by or against an American,[15] to those places not under the jurisdiction of any other nation and to certain vessels of foreign nations.

Certain United States facilities located in other countries were also covered by the definition of "special maritime and territorial jurisdiction" as it existed prior to the PATRIOT Act. *See* 18 U.S.C. § 7(3) (encompassing "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof ... for the erection of a fort, magazine, arsenal, dockyard, or other needful building."). However, the federal courts could not resolve exactly what this section covered. In *United States v. Erdos*,[16] a 1973 decision, the Court of Appeals for the Fourth Circuit held that § 7(3) covered acts committed on the grounds of United States embassies. However, when prosecutors attempted to apply § 7(3) to allow prosecution in domestic federal courts of crimes committed on overseas military bases and in apartments leased by the United States government overseas, the Courts of Appeals split, with several decisions finding that the "special maritime and territorial jurisdiction" did not extend to such places.[17]

The number of American troops stationed overseas has grown radically since the end of the Second World War, when the main outlines of 18 U.S.C. § 7 were laid out. With them has come "an unprecedented number of American civilian dependents and non-military government employees accompanying those troops." Glenn R. Schmidt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55, 56 (2001). Some such civilians and employees are not constitutionally subject to the jurisdiction

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14 *United States v. Salerno*, 481 U.S. 739, 755 (1987).

15 Technically, against a "national" of the United States, a term defined in the Immigration and Nationality Act to be somewhat broader than "citizen."

16 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973).

17 Compare *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (finding Congress failed to make a clear statement in favor of extraterritorial application of § 7(3)) with *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (finding jurisdiction, with a dissent by Judge McKeown, who agreed with *Gatlin*).

of military courts (courts-martial). As a result, the gap created by the split Circuit decisions in the applicability of domestic criminal law to places overseas presented a serious problem.

Congress closed this gap by enacting the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"). The MEJA states that "[w]hoever engages in conduct outside of the United States" that would constitute a federal felony if it had been within the "special maritime or territorial jurisdiction of the United States" can be prosecuted in the federal courts if their actions occurred while "employed by or accompanying the Armed Forces outside the United States" or "while a member of the Armed Forces subject to the" Uniform Code of Military Justice ("UCMJ"), the statutory authority for military courts-martial. 18 U.S.C. § 3261(a). However, where the violation charged is a violation of the UCMJ itself, no member of the Armed Forces may be charged under the MEJA unless they are no longer a member of the armed forces, or they were acting with someone who was not a member of the armed forces subject to the UCMJ. *See* 18 U.S.C. § 3261(d). In sum, "[t]he Act effectively establishes federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces. It also extends federal criminal jurisdiction to members of the Armed Forces who commit crimes abroad but who are not tried for those crimes by military authorities and who are no longer under military control." Schmidt, 51 CATH. U.L. REV. at 56.

The PATRIOT Act added subsection (9) to 18 U.S.C. § 7, stating that "[w]ith respect to offenses committed by or against a national of the United States ... the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities" and the residences of personnel assigned to those missions or entities, all fall within the "special maritime or territorial jurisdiction of the United States." The new § 7(9) does make an exception for persons described in part (a) of MEJA, 18 U.S.C. § 3261. The Congressional Research Service report states that Section 804 "[i]s intended as a residual provision and therefore does not apply where it would conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act (18 U.S.C. 3261)." Congressional Research Service, *Terrorism: Section by Section Analysis of the USA PATRIOT Act* (Dec. 10, 2001) at 48.[18]

2. The interaction of the UCMJ, MEJA and USA PATRIOT Act

The UCMJ is applicable to the persons specified in 10 U.S.C. § 802, including all members of the armed forces who have not yet been discharged, and various other categories of persons. The text of UCMJ § 802 makes certain persons "serving with, employed by, or accompanying the armed forces outside the United States" subject to the UCMJ, 10 U.S.C. § 802(10), and thus subject to trial by court-martial for offenses spelled out in the UCMJ. However, the federal courts have repeatedly held that courts-martial have no jurisdiction to try civilian employees of the military during peacetime, *see, e.g.*, *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960), and the military courts have refused to extend the principle to "undeclared" wars such as Vietnam. *See United States v. Averette*, 19 C.M.A. 363 (Court of Military Appeals 1970). "With this comprehensive narrowing of court-martial jurisdiction under [UCMJ §802](10) and 2(11), predictably there have not been any

[18] Available at http://www.epic.org/privacy/terrorism/usapatriot/RL31200.pdf.

cases [brought against civilian military employees under these provisions] in over thirty years. Except in times of declared war, court-martial jurisdiction over civilians is effectively dead." Major Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 Mil. L. Rev. 92, 98 (2001).

Since MEJA applies to military contractors and employees so long as they are not subject to the UCMJ, and contractors and employees are not subject to UCMJ except during wars declared by Congress, the MEJA extends federal civilian prosecutorial power to civilian contractors and employees guilty of federal felonies in connection with misconduct in Afghanistan and Iraq. However, MEJA exempts active members of the armed forces from such prosecution (unless acting with others not subject to the UCMJ). Under subsection (d) of MEJA, such prosecutions must wait until the possibility of prosecution by military officials has passed—typically, until discharge from the military.

In light of this, one could read § 804 of the Patriot Act in two ways. It could be the case that it was intended, as the Congressional Research Service stated, "as a residual provision [that] does not apply ... where the offender is covered by the Military Extraterritorial Jurisdiction Act." If that is the case, active military personnel, who are subject to the UCMJ, would therefore not be subject to prosecution under the MEJA (unless their foreign misconduct was done in concert with others not subject to the UCMJ, like civilian contractors and/or employees), and would therefore be subject to prosecution under PATRIOT Act § 804. On this reading, such military personnel would be subject to prosecution by military prosecutors under the UCMJ at the same time as they are subject to civilian prosecution under PATRIOT Act § 804.

Alternately, one could read PATRIOT Act § 804 narrowly and literally, to mean that all "person[s] described in [18 U.S.C.] section 3261(a)" are exempt from prosecution by civilian authorities under that section. On this reading, only those active duty personnel who committed misconduct with persons not subject to the UCMJ (*e.g.* contractors and employees) would be subject to prosecution by civilian authorities (under the MEJA).

Whichever reading prevails,[19] there are good reasons for Congress to seek to ensure that there is always some available civilian prosecutorial authority over military personnel worldwide, even where these personnel are simultaneously subject to prosecution in courts-martial under the UCMJ.

3. The Military's own prosecutions have been too slow and ineffective

Of the 341 investigations for abuses in Iraq and Afghanistan, the Pentagon found that 70% were not substantiated. Of the 30% that were substantiated, only around a third were referred to trial by court martial. According to Human Rights Watch, as of March 2005, the 300-plus investigations resulted in only 14 convictions by courts-martial. While 33 additional servicepersons were referred for trial by court-martial, the vast majority of the substantiated investigations resulted in either non-judicial punishments (reprimands, rank reductions, or

[19] To date it appears that the prosecution of CIA operative David A. Passaro is the only domestic criminal prosecution to invoke the jurisdictional provisions of Section 804. *See* Indictment, *United States v. Passaro*, No. 5:04-CR-211-1 (W.D.N.C.). The case awaits trial, which is scheduled to begin July 11, 2005.

discharge) or lesser administrative sanctions, despite the fact that "many of the alleged abuse cases involved serious abuses or homicides." (Cases resulting in non-judicial punishments have been included in statistics the Pentagon has released to the press to document the number of soldiers punished for prisoner abuse.)[20]

There are many reasons that serious criminal charges like murder are brought to trial quickly in the domestic arena. Prosecutors have an incentive to keep evidence and witness memories fresh, and a mission to bring swift justice. Defendants have the same concerns for preserving exculpatory evidence, and, because their names become public, they usually wish to seek a swift resolution of charges for the sake of their reputations. The Constitution accordingly mandates speedy trials. Despite all these imperatives, the pace of military trials for even the most serious criminal allegations—the deaths of detainees—has been exceedingly slow. Human Rights Watch reports that, as of February 2005, there have been "68 detainee death investigations with 79 possible victims. Yet only two homicide cases have resulted in recommended courts martial for homicide; one has been postponed and in another, most of the implicated personnel were brought before non-judicial administrative hearings instead of court-martial, and most received only administrative punishments. Many cases involving detainee deaths in Afghanistan in 2002, over two-and-a-half years ago, have gone unresolved."[21]

Courts-martial have received a great deal of media attention recently with the trials and plea bargains of the enlisted servicepersons implicated at Abu Ghraib. Under the UCMJ, seven soldiers have been convicted of abuses at Abu Ghraib: six who had guilty pleas accepted and one, Charles Graner, convicted after trial. Two more await trial. However, "[u]ntil the publication of the Abu Ghraib photographs forced action, almost all military investigations into deaths and mistreatment in custody were languishing."[22] To our knowledge, no criminal prosecutions are underway against any officers or contractors at Abu Ghraib despite the fact that the Taguba and Fay Reports named a number of officers who the authors found or suspected to have both direct and supervisory responsibility for the abuses.[23]

Various commentators and academics have noted that the manner in which various stages of the Abu Ghraib investigation were carried out was skewed towards an ultimate resolution which absolved higher-level officers from responsibility and instead promoted the notion that the abuses were the product of a rampage by a "handful of 'rotten apples.'"[24] Major General Fay interviewed soldiers in the presence of their commanding officers, reminding them in these meetings that any soldier who witnessed abuse and did not report it could be charged for that failure. In the end only lower-ranking individuals were prosecuted, many of whom had the sense that they were selected for letting photos out to the public rather than for perpetrating abuse.[25] The presiding judge, by refusing to grant immunity to certain higher-ranking witnesses, effectively foreclosed testimony that might have implicated high-level defendants.[26]

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20 See Human Rights Watch, *Getting Away with Torture? Command Responsibility for Abuses at Abu Ghraib* (April 2005), http://www.hrw.org/reports/2005/us0405/us0405.pdf, at 26.

21 *Id*.

22 *Id*.

23 *Id*. at 78-80.

24 Declaration of Scott Horton, Esq. (Jan. 28, 2005) at ¶12.

25 *Id*. ¶18.

26 *Id*. ¶19.

Despite the slow and ineffective progress of the military justice system in holding military personnel accountable for their misconduct, we have relied on the courts-martial exclusively. With one exception,[27] no criminal prosecutions in federal court have been initiated for the torture, violations of the Geneva Conventions, other abuses and deaths that have occurred at Guantánamo, at the secret locations around the world where so-called "ghost detainees" have been detained at the behest of the United States, and in the third countries where the United States has sent detainees to be tortured. Not a single agent of the government or military has been prosecuted for torture or war crimes under the Anti-Torture Act of 1996, 18 U.S.C. § 2340, the War Crimes Act of 1996, 18 U.S.C. § 2241, or the MEJA, 18 U.S.C. § 3261.[28]

4. Other factors supporting extension of civilian prosecutorial power over members of the armed forces overseas

Increasingly, military contracting support is obtained through interagency purchasing schemes, where the final contracts are between a private party and an agency other than the Department of Defense. For example, the Interior Department and the Government Services Administration have been used recently to obtain contractor support in Iraq. The administration has privatized even the most sensitive functions related to intelligence and the security of foreign heads of state—private contractors replaced the special forces as the U.S.-provided security detail for Afghan President Hamid Karzai, and they notoriously comprise many of the translators and interrogators at Abu Ghraib and Guantánamo. The Fay Report expressed concern that because some of the private contractors at Abu Ghraib were not under contract to the Department of Defense, they might not be subject to the Military Extraterritorial Jurisdiction Act[29] (which reaches persons "employed by or accompanying the Armed Forces outside the United States"). While this is an undecided question of law, the fact that the military itself believes this is an open question highlights the need for residual statutes like Section 804 that plug gaps in the MEJA.

Although the issue has not been resolved definitively in the federal courts, the UCMJ may not be constitutionally applicable to civilian military officials, such as Secretary Rumsfeld, Undersecretary of Defense for Policy Douglas J. Feith, Undersecretary for Defense for Intelligence Stephen A. Cambone, or others implicated in the interrogation and detention policies at Abu Ghraib and Guantánamo.[30] The use of military—as opposed to civilian—courts also may be inappropriate to many prosecutions for detainee abuse. The Constitution, as interpreted by the courts, does allow for military criminal prosecution over active duty soldiers in a variety of situations far from the context of the battlefield. However, the ultimate justifications for allowing a system of military justice are rooted in the idea that battlefield imperatives make civilian process unworkable.[31] Today's UCMJ jurisdiction extends far beyond such situations, to many

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27 The prosecution of CIA agent David Passaro; see footnote 19, *supra*.

28 Amnesty International, *Guantánamo and beyond: The continuing pursuit of unchecked executive power*, AMR 51/063/2005 (May 13, 2005) at 93.

29 *See* Steven L. Schooner, *Contractor Atrocities at Abu Ghraib*, 16 Stan. L. & Pol'y Rev. 549, 570 (2005), citing MAJOR GENERAL GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 50 (2004).

30 Horton Declaration, at ¶17.

31 Some of these commonly-stated justifications are: it may be too difficult to bring witnesses into civilian courtrooms from the field, and too burdensome to make military personnel distract themselves with the tasks of

ordinary crimes carried out far from the chaos and urgency of the battlefield, such as the detention abuses at Guantánamo or Abu Ghraib. Even where the Constitution allows the UCMJ to provide for jurisdiction over some of the matters discussed above, we should be hesitant to encourage exclusive military prosecution of these matters by diminishing the parallel jurisdiction of civilian prosecutors under PATRIOT Act 804.

The extension of United States criminal jurisdiction to bases and facilities in foreign countries is important for diplomatic reasons as well, for it enhances the credibility of United States delegations that negotiate status-of-forces agreements (SOFAs) with those foreign countries. Typically, SOFAs provide that, for criminal acts committed by Americans on foreign soil, each nation may prosecute those offenses that violate only its own law, but where the actions are crimes under the laws of both nations, a SOFA usually provides that one nation has primary jurisdiction. "The position of a U.S. delegation negotiating provisions of a SOFA on foreign criminal jurisdiction is strengthened by assuring the receiving state that, if it declines to prosecute, the United States has both jurisdiction and the will to prosecute Americans accused of committing crimes within that state's territory."[32]

5. Conclusions

Ideally, civilian federal prosecutors should have jurisdiction to bring federal charges against United States military personnel and contractors wherever they operate around the world, regardless of whether the UCMJ also provides military court jurisdiction over their crimes. Such parallel jurisdiction would allow prosecutors outside of the military and its chain of command to make independent decisions about when to prosecute the worst cases of abuse, and would undoubtedly expedite the progress of cases involving abuse which the military might have a disincentive to prosecute (due to the potential for public scrutiny and embarrassment accompanying trial).

Even if such a statute existed today, however, it would clearly not be enough to deal with the widespread and high-reaching detention abuses carried out by our government at Abu Ghraib, Guantánamo and elsewhere in the world. Attorney General Gonzales, who would be ultimately responsible for federal prosecutions for these abuses, is personally implicated in the formulation of some of the official policies at issue in the current detention abuse scandals.[33] The Center for Constitutional Rights and other groups have called for the appointment of an independent prosecutor to investigate the full scope of these abuses.

Because of the United States' failure to investigate and prosecute torture and other abuses at Abu Ghraib and elsewhere in Iraq, CCR and four Iraqi victims brought a complaint in Germany against high-level United States officials for war crimes under the doctrine of universal jurisdiction. The German Federal Prosecutor decided that it would not prosecute, stating that it

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gathering evidence; the fog of war may make any reliable evidence more difficult to garner, thus justifying lower standards of evidentiary admissibility; and so forth.

[32] Mark J. Yost and Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 A.J.I.L. 446, 447 (2001).

[33] In his Senate confirmation hearings, Attorney General Gonzales declined to assure that he would recuse himself from any investigation of detainee abuse matters.

is up to the United States to pursue initial legal action against the alleged perpetrators of torture and their superiors, and that the German prosecutors would intervene only if U.S. authorities failed to act. Congress should ensure that federal prosecutors have sufficient jurisdictional reach to aggressively pursue such crimes—and lesser abuses—in the future.

Respectfully submitted,

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